83-1237

No. _____

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Francisco Sanchez-Martinez,
Petitioner.

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QUESTION PRESENTED FOR REVIEW

WHAT IS THE PROPER STANDARD OF APPELLATE REVIEW FROM A CIVIL ACTION TO DECIDE UNITED STATES CITIZENSHIP?

OPINION BELOW

The Ninth Circuit's opinion in *Francisco Sanchez-Martinez v. Immigration and Naturalization Service*, No. CA82-5501, dated August 22, 1983, is reproduced as Appendix I. The opinion is published at 714 F.2d 72. The order of the Ninth Circuit denying petitioner's application for rehearing is reproduced as Appendix II.

JURISDICTION

On January 27, 1982, the United States District Court, District of Arizona, entered a judgment declaring that Francisco

Sanchez-Martinez was not a citizen of the United States. A timely notice of appeal was filed, and on August 22, 1983, the Court of Appeals for the Ninth Circuit affirmed the judgment. A petition for rehearing and suggestion for rehearing en banc was filed and subsequently denied on October 26, 1983, with one judge, a member of the panel which decided the case, recommending in favor of rehearing en banc.

This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1). Petitioner urges the Court to exercise its discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution states in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The fourteenth amendment to the United States Constitution states in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1105a(a)(5) states in pertinent part:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall . . . where a genuine issue of material fact as to petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim. . . .

STATEMENT OF THE CASE

(A) Introduction

This case presents a simple and important question: what is the standard for appellate review of a district court's declaratory

judgment on the question of citizenship. The court of appeals decided this question contrary to the principles of *Chaunt v. United States*, 364 U.S. 350 (1960); *Nowak v. United States*, 356 U.S. 660 (1958); *Baumgartner v. United States*, 322 U.S. 665 (1944); *Gonzales v. Landon*, 350 U.S. 920 (1955); *Nishikawa v. Dulles*, 356 U.S. 129 (1958); and *Woodby v. INS*, 385 U.S. 276 (1965). Rather than independently determine whether the historic facts satisfied the heavy burden of proof imposed upon the INS in citizenship cases, the court of appeals substituted a deferential "clearly erroneous" standard of appellate review. Inasmuch as this case turns upon one constitutional fact, citizenship, and the weight an appellate court should give to a district court's conclusion as to citizenship, Petitioner has set forth the history of this case in detail.

(B) Procedural History

This case began on October 24, 1974, when the Immigration and Naturalization Service ("INS") commenced deportation proceedings against Francisco Sanchez-Martinez ("Frank Sanchez"). The sole issue at the deportation hearing was Mr. Sanchez's citizenship. The INS maintained that Mr. Sanchez was a citizen of Mexico and not a citizen of the United States. It introduced evidence that Mr. Sanchez was born in Imuris, Sonora, Mexico, in 1933. Mr. Sanchez maintained that he was a citizen of the United States by birth and hence not subject to deportation. He introduced evidence that he was born in Nogales, Arizona, in 1933.

On November 6, 1974, the immigration judge held that Mr. Sanchez was not an American citizen. Mr. Sanchez appealed to the Board of Immigration Appeals, and on August 17, 1976, the Board entered its order dismissing the appeal.

Mr. Sanchez then filed a petition for review to the United States Court of Appeals for the Ninth Circuit pursuant to 8 U.S.C. § 1105a(a)(5). On November 14, 1977, a panel of the court of appeals unanimously granted the petition for review. In an unpublished memorandum decision, the court of appeals held that Mr. Sanchez had made a non-frivolous claim to American citizenship and that there was a genuine issue of material fact with respect to his place of birth. In such a case, the court of appeals held, 8 U.S.C.

§ 1105a(a)(5) required a de novo hearing on the issue of citizenship in the district court.

Pursuant to the memorandum decision, the INS commenced proceedings against Mr. Sanchez in district court on March 6, 1978. The INS took no further action in the case, it languished in the district court for over a year, and the district court entered judgment sua sponte dismissing the action for want of prosecution on December 11, 1979. CR "3."[1] The parties filed a joint motion to vacate the judgment on January 25, 1980, CR "4," and the judgment was vacated the same day, CR "5."

After mutual discovery and pretrial briefing and argument on the burden of proof, the parties proceeded to trial on October 20-23, 1981, before the Hon. Earl H. Carroll.

(C) Facts Material to the Question Presented

1. *Background Facts*

The de novo hearing on citizenship before Judge Carroll was brief. The reporter's transcript of the hearing and the deposition transcripts received in evidence total less than 500 pages. However, since all of this evidence dealt with a single very narrow factual question — where Frank Sanchez was born — the degree of factual elaboration was actually quite great. Judge Carroll complimented both counsel on the amount of evidence they were able to bring to bear on this obscure event now fifty years in the past. III RT 334-35.

Frank Sanchez's parents, Luis Tapia Sanchez and Carmen Martinez de Sanchez, both now deceased, were Mexican citizens who lived in both Mexico and Arizona in the 1920's and 1930's. In approximately 1926 they moved from Mexico to Nogales, Arizona, a town on the Arizona-Mexico border, where Luis Tapia Sanchez worked for a lumber company. I RT 19, 37. At the time

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[1] The district court clerk's record is cited as CR "___," the number in quotes indicating the docket number. The reporter's transcript is cited as ___ R.T. ___, the first number indicating the volume, and the second, the page. Ex. ___ refers to the trial exhibits. Mr. Sanchez's exhibits were denoted by numbers, the INS's, by letters.

they came to Nogales, they had two Mexican-born children, Armando and Manuel. I RT 36-37, 103, II RT 130, 146.[2] In Nogales, they had at least three more children. The eldest, Rafaela, was born in 1926. II RT 126, Ex. E. The next, Luis, was born in 1928. I RT 59-60, Ex. H. The third, Henry, was born in 1931. I RT 98, Ex. K.

Sometime between 1931 and 1936, the Sanchezes returned to Mexico, first to Bella Vista, then to La Bicoca, very small communities near Imuris, Sonora, about 35 miles south of Nogales, where they operated a restaurant. I RT 23, 27, 54, 104, II RT 143. Frank Sanchez, the last of the Sanchez children, was born on November 29, 1933, either shortly before or shortly after the family moved to the Imuris area. If his birth occurred shortly before the move, then he is an American citizen by birth like his sister Rafaela and his brothers Luis and Henry. On the other hand, if he was not born until shortly after the move, then he is an alien subject to possible deportation. Whether his birth occurred shortly before or shortly after his family's move to Mexico was the sole disputed fact in the de novo hearing before Judge Carroll.

Regardless of where Frank Sanchez was born, it is undisputed that he grew up in Mexico, went to grade school in Mexico, and aside from visits to America, lived there until 1951. II RT 140-44. In that year he came to America to register for the selective service and with a few interruptions, has lived and worked here ever since. II RT 140-41, Ex. 1. Mr. Sanchez now lives in Glendale, Arizona. II RT 139. Since 1968 he has worked as a supervisor for Production Farms, Inc. II RT 141. He is married to Maria de la Luz Paredes Sanchez, and they have four Mexican-born, and two American-born, children, ranging in age from 3 to 20. II RT 165-67. Not until the 1970's did the INS question his citizenship and seek to deport him.

2. *The Facts Bearing on Mr. Sanchez's Place of Birth*

The evidence was, of course, in conflict. Because there is no reliable, contemporaneous record of Mr. Sanchez's birth, and

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[2] Maunuel died in 1972. I RT 101. Another child, Roberto, was older than Manuel, but younger than Armando. He died long ago, but the record does not reflect exactly when. I RT 61-62.

because the one person with truly first-hand knowledge of the birth — his mother — died long before these proceedings began, II RT 144, we will never know for certain, barring the discovery of new evidence, where Frank Sanchez was born. The INS itself conceded at trial that "nobody knows for sure" where Frank Sanchez was born. III RT 318. In spite of this uncertainty, this is not a case in which the truth may be somewhere between the parties' contentions. Mr. Sanchez was either born in Arizona or Mexico; there are no other possibilities. The evidence of each, as developed at the de novo hearing, is discussed in turn below.

(a) *The Evidence of Arizona Birth*

The evidence that Mr. Sanchez was born in Arizona may be divided for convenience into five categories: direct recollection of the birth by two witnesses, family reputation evidence, testimony of neighbors about the Sanchez family after the family moved to Mexico, the evidence of Mr. Sanchez's lifelong behavior, and the evidence of his baptism.

The first category is the testimony of two people old enough to have actual recollection of the birth, Henry Bazurto and Frank Sanchez's oldest brother, Armando Sanchez. Henry Bazurto was born in February 1918 and was therefore 15 years old when Frank Sanchez was born in November 1933. I RT 9. He lived in Nogales, Arizona, until 1956, with the exception of overseas service in World War II. I RT 9, 31. He knew the Sanchez family very well until they left for Mexico in the 1930's, I RT 17-18, but by the time of the hearing he had completely lost touch with them, I RT 10-11.

Mr. Bazurto testified at length about his memories of life in Nogales in the 1920's and 1930's — his teachers, friends, church activities, the doctors in Nogales in those years, the lay of the land, and so on. I RT 12, 22, 29-33. He also testified that some time in the early 1930's the Sanchez family moved from its earlier residence on Elm Street to Bostwick Court. I RT 19-21. While the Sanchezes lived on Bostwick Court, Mrs. Sanchez had a baby named Panchito. I RT 21. The birth was attended by an Anglo physician, either Dr. Gustetter or Dr. Chenoweth. I RT 22. After Panchito was born, the family moved to Mexico, Armando and Manuel, the two eldest

children, remaining in Nogales for a time and then rejoining the family. I RT 23, 26.

The other witness old enough to have actual memory of the birth was Armando Sanchez, Frank's oldest brother. Armando was born in January 1917 and was 16 years old when Frank was born. I RT 36-37, 49. Like Mr. Bazurto he testified that his mother had a baby when the family lived on Bostwick Court and that the baby's name was Pancho. I RT 41-42. Armando had a more definite recollection of the physician attending the birth, however, since Armando himself fetched him: it was Dr. Gustetter. I RT 42. After the birth the family moved to Mexico, the father leaving ahead of the rest of the family, and Armando and Manuel leaving after the rest of the family. I RT 42, 54.

The testimonies of these two witnesses are especially significant not only because they are consistent in the crucial details — a child born on Bostwick Court, named Pancho or Panchito, whose birth was attended by an Anglo physician — but also because of the significance of these details in the light of other evidence. As Mr. Bazurto and Armando Sanchez testified, and as other evidence showed, Ex. AA, BB, the Sanchezes lived both on Elm Street and Bostwick Court in Nogales. According to their Arizona birth certificates, Ex. E, H, K, and the district court's amended findings, III RT 346, Rafaela, Luis, and Henry Sanchez were all born on Elm Street and each was attended by a midwife, not a physician. Finally, the evidence was uncontradicted that Pancho or Panchito is a nickname for Francisco, that Frank Sanchez was and is known by these nicknames, and that he is the only member of the family so known. I RT 26, 64, 172. Thus, Mr. Bazurto and Armando Sanchez could not have confused the birth of Frank with that of another Sanchez child.

The second major category of evidence of Arizona birth is family reputation evidence. Although Rafaela, Luis, Henry and, of course, Frank himself are not old enough, as Mr. Bazurto and Armando Sanchez are, to remember the birth, they all testified that their parents had told them, and that it was common knowledge within the family, that the younger children — Rafaela, Luis, Henry, and Frank — were all born in Arizona and the older children —

Armando and Manuel — were born in Mexico. I RT 62, 102-03, II RT 129-31, 144-46. The district court found as a fact that Frank Sanchez and his siblings sincerely believe that Frank was born in Arizona and that this belief is based on conversations with their parents long before this litigation began. CR "66" at ¶ 12.

The third major category of evidence of Arizona birth is the testimony of neighbors of the Sanchezes in the 1930's. Lenor Duarte de Lara and Ramon Valenzuela testified by deposition that they lived in the Imuris area in the 1930's (and still live there), that they knew the Sanchez family well, and that they remembered when the Sanchez family first arrived there. Ex. 13 at 5-7, Ex. 14 at 6-7. Mrs. De Lara was 75, and Mr. Valenzuela 71 at the time of their depositions so both were in their 20's when the Sanchez family arrived. Ex. 13 at 6, Ex. 14 at 6. Both testified that when the Sanchez family arrived Pancho was with them and Mrs. Sanchez was never pregnant when the family lived in the Imuris area. Ex. 13 at 9, Ex. 14 at 10-11.

A fourth category of evidence of Arizona birth is Mr. Sanchez's behavior during his entire life. He has always behaved as if he truly believed he was born in the United States. The district court so found. CR "66" at ¶ 12-15. He came to the United States in order to register for the selective service in 1952, soon after his eighteenth birthday, because his parents told him that he was obligated to do so. II RT 162-63. His draft card states that he was born in Nogales, Arizona. Ex. 1. Likewise, Mr. Sanchez applied for a social security card in 1955 and listed his birth place as Nogales, Arizona. Ex. 2. In 1964 and 1967 he registered the births of his Mexican children and listed his birthplace as Nogales, Arizona. Ex. 3-6. All of this occurred long before this litigation commenced.

A final category of evidence of Arizona birth is the evidence of Mr. Sanchez's baptism. He was baptised in 1936 in the Sacred Heart (Catholic) Church in Nogales, Arizona. The baptismal register does not have a column for birthplace, only for residence. Mr. Sanchez's residence is stated to be Nogales, Arizona. Ex. 11. At that time, however, according to the INS's own version of the facts, the family's residence was *not* Nogales, Arizona; the family was by then living permanently in the Imuris area. Since the residence

and birthplace of a baptized infant are nearly always the same, the most likely explanation is that the church official celebrating the baptism asked where the child was born and was told Nogales, Arizona.

This was the evidence of Arizona birth presented at the de novo hearing. The district court easily concluded that it amounted to a prima facie case of Arizona birth. II RT 187-88.

(b) *The Evidence of Mexican Birth*

At the de novo hearing, as at the original deportation hearing, the INS had only two items of evidence tending to show Mexican birth: the absence of an original Arizona birth certificate, Ex. N, and a non-contemporaneous Mexican birth record. Ex. GG-5. In its earlier opinion in this case, the court of appeals had held that this evidence, although obviously of importance, "in no way should . . . be deemed conclusive." The evidence presented at the de novo hearing, which was not presented at the deportation hearing, illustrates why this evidence is entitled to only scant weight.

The evidence at the hearing established that the absence of an Arizona birth certificate is not unusual. Alfonso Bravo, the manager of the vital records section of the Arizona Department of Health Services, testified that over 40,000 children have been born in Arizona without original Arizona birth certificates. I RT 88. This could happen, he testified, because the attending physician or midwife could have failed to execute a certificate; or because he or she could have given the original certificate to the parents, or lost it, instead of forwarding it to the local county registrar; or because the local registrar could have failed to forward it to Phoenix; or because it could have been mislaid after reaching Phoenix. I RT 86-88, III RT 282-83.

In this case it is especially understandable that Frank Sanchez does not have an original Arizona birth certificate on file in Phoenix. The evidence at the hearing established that the family lived in Nogales, Arizona, from 1926 until the 1930's; that they were poor; that the family returned to Mexico in the 1930's, expecting to stay there for good; and that the father left for Mexico in advance of the rest of the family. I RT 27, 45, 54. Two witnesses,

Armando Sanchez and Henry Bazurto, testified that an Anglo doctor, not a midwife, delivered the last Sanchez child. I RT 22, 42. In these circumstances — a poor, Mexican-heritage family, living on the border in the depth of the depression, and preparing to return at once to Mexico, the father having already left — it is hardly surprising that an Anglo physician might not have been particularly interested in executing a birth certificate, or that the family should have been relatively uninterested in obtaining one.

The INS's chief piece of evidence, however, was a Mexican birth record, Ex. GG-5, dated more than two weeks after Frank's birth and reciting that he was born in Imuris. The evidence at trial established, however, that a Mexican birth record of the 1930's is quite a different sort of document from an Arizona birth certificate. Both Mr. Barreda, the INS's own expert, and Alfonso Bravo testified that a Mexican birth record of this vintage is purely a hearsay recital. It is merely a statement by a local official of what he was told by a person who comes before him to report the birth of a child. It is not, as an Arizona birth certificate is, executed and filed by the attending physician or midwife at the birth contemporaneously with the birth. I RT 89-90, II RT 193-210, III RT 279-80. Mr. Bravo summarized the difference between the two systems by testifying that the Arizona system is a doctor-midwife generated system and the Mexican system was then a parent generated system. I RT 89.

The mere existence of a Mexican record is therefore no proof that the child was born in Mexico. Both Alfonso Bravo and Mr. Barreda testified that they had seen Mexican birth records which recited that the child was actually born in the United States. I RT 89-90, II RT 228, 232. This is impossible in an Arizona birth certificate. The mere fact that there exists an Arizona birth certificate establishes that the birth occurred in Arizona. I RT 90, III RT 279.[3]

The INS's key evidence was therefore not the Mexican record itself, nor the vast majority of its contents, but the record's recital that Frank Sanchez was born in "este pueblo" — "this town," referring to Imuris. It is these two words only that tend to

[3] Recently Arizona has modified its system so that an Arizona certificate reciting foreign birth may be issued to certain classes of foreign-born children adopted by Arizona parents. I RT 90.

show that Frank Sanchez was born in Mexico. The evidence at trial showed, however, how easily these two words could be erroneous.

Eleazar Fontes, a Mexican lawyer who devotes a considerable part of his practice to the "rectification" of Mexican birth records, testified that Mexican birth records were often prepared in a very informal fashion. This was especially so in small towns where the registrar already knew, or imagined he knew, the relevant facts:

> Q. What about in a smaller town?
>
> A. In smaller towns, the facts sometimes are known by the civil registry officer, and other times they are imagined by the civil registry officer, and thus, he establishes in the document in many occasions what he imagines the facts of the cases are.

Ex. 16 at 12. In addition, the registrar himself was often incompetent or unqualified. Mr. Fontes knew of cases in which the registrar was illiterate. Ex. 16 at 17.

Mr. Fontes testified that he had frequently had occasion to "rectify" Mexican birth records to correct errors such as the name of the city where the child was born, that the child was born at all, the name of the child, and the birth date. Ex. 16 at 19. Further, he had first-hand knowledge of four cases in which a Mexican birth record recited Mexican birth when in fact the child was born in America. Ex. 16 at 23-30. Even Mr. Barreda, the INS's own expert, testified that fully one percent of Mexican birth records from the State of Sonora were erroneous. II RT 210.

In addition to all this evidence of the unreliability of Mexican birth records generally, the birth record at issue in this case betrays on its face the haphazard manner in which it was prepared. The record purports to be only the registrar's understanding of what Frank Sanchez's father, Luis Tapia Sanchez, said to him. If such a conversation took place at all — and, before he died, Luis Tapia denied that it did, Ex. 8 — it is certain that at least one thing Luis Tapia may have said during that conversation was grossly misunderstood. The record states that Luis Tapia's mother, Escolastica de Sanchez, was "ya finad[a]" — "already dead." In fact she was not dead and did not die until 1970. I RT 43, II RT 104-05, 132.

It is difficult to believe that Luis Tapia did not know whether his own mother was living or dead. The testimony at the hearing established there was no mystery about Luis Tapia's mother and no reason to suppose that he would not have known that she was living. I RT 43, II RT 104-05, 132. It must have happened, therefore, that even if Frank Sanchez's father did meet with the registrar, the registrar simply misunderstood Frank's father's statement that his mother was "already dead." The certificate also misstates Frank's father's age — another mistake more likely to occur as a result of a misunderstanding than as a result of a mistake by Frank's father. Ex. 9.

The registrar could also have misunderstood Frank's father to say that the newly-born baby was born in that town, when in fact he may have said that the child resided in that town. Indeed, for a child so young, and with a father presenting himself to register the birth, it may never even have been discussed where the child was born, since the registrar would naturally assume that the baby was born there. And, as Mr. Fontes testified, such an assumption would have been commonplace for a rural registrar in the 1930's. Ex. 16 at 12.

On this evidence, Judge Carroll decided that the INS had carried its burden of proving alienage.[4] He issued his Findings of Fact and Conclusions of Law on January 7, 1982, CR "66", and entered judgment in favor of the INS on January 27, 1982, CR "72." Judge Carroll also entered an order staying Mr. Sanchez's deportation as long as the judgment was under review. CR "71" (later clarified, CR "85").

Mr. Sanchez timely filed a Motion for New Trial or, in the Alternative, to Amend the Findings of Fact and Conclusions of Law, on February 8, 1982. CR "78." The primary relief requested was that the court reverse itself and find that the INS had not carried its burden of proving Mexican birth. The INS responded, CR "86," Mr. Sanchez replied, CR "89," and on March 29, 1982, the district court granted some of the requested amendments, denied others, and denied Mr. Sanchez's primary request that the district court

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[4] Relying on *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970), Judge Carroll required the INS to prove alienage by clear, convincing, and unequivocal evidence.

reverse itself and enter judgment in his favor. CR "94." Mr. Sanchez appealed both from the judgment and the district court's denial of his Motion for New Trial. CR "90."

(D) Case History Before the Ninth Circuit

The sole issue presented for review before the court of appeals was whether the INS proved by clear, unequivocal, and convincing evidence in the de novo hearing before Judge Carroll that Frank Sanchez was born in Mexico. Relying upon the leading case in the Ninth Circuit on the standard of appellate review in citizenship cases, *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970), Mr. Sanchez argued that the court of appeals "must make an independent determination as to whether the evidence introduced by the INS was 'clear, unequivocal and convincing.'" 431 F.2d at 199. In other words, the court of appeals had a duty to review independently the historic facts against the burden of proof imposed upon the INS.

The INS disputed the proper scope of appellate review, arguing that the court of appeals must accept the trial court's ruling that Mr. Sanchez was Mexican-born unless the ruling was "clearly erroneous." The court of appeals agreed with the INS, stating:

> *Lim*, which involved unusual facts, does not provide the standard of review here. In *Lim* there had been a prior determination of identity and citizenship by the Service upon which both the petitioner and the government had relied for many years. Lim had claimed his citizenship derivatively from his grandfather, who was born in the United States. The government did not dispute the citizenship of the persons Lim claimed as his father and grandfather. The only issue was whether Lim was in fact the grandson of the man from whom he claimed his derivative citizenship. The district court found that Lim was not a citizen. We reversed, holding that, in light of the Service's prior determination of citizenship and Lim's reliance on it for more than thirty years, the district court had erred in concluding that the government had met its burden of proving by "clear, unequivocal, and convincing" evidence that Lim was not a United States citizen. *Lim*, 431 F.2d at 204.

> In the present case there has been no prior determination of citizenship. Sanchez-Martinez's claim to United States citizenship is based solely on his own belief and the recollections of others as to his putative birth in the United States some fifty years ago. Further, Sanchez-Martinez does not claim his citizenship derivatively from a citizen of the United States. The facts of this case are not sufficiently similar to those of *Lim* to justify a departure from our normal practice of rejecting a district court's findings of fact only if clearly erroneous. Fed. R. Civ. P. 52(a); *Yee Tung Gay v. Rusk*, 290 F.2d 630, 632 (9th Cir. 1961).

Sanchez-Martinez v. INS, 714 F.2d 72, 74 (9th Cir. 1983). After adopting the "clearly erroneous" appellate review standard, the court of appeals concluded that Judge Carroll's findings were supported by the record:

> The district court could properly have found that the following facts were "clear, unequivocal, and convincing":
>
> 1) Sanchez-Martinez does not have an American birth certificate.
>
> 2) All of his American-born siblings have American birth certificates.
>
> 3) He has a Mexican birth certificate.
>
> The district court was not clearly erroneous in concluding that these facts and other evidence, though disputed, were sufficient to support a determination that Sanchez-Martinez is not an American citizen.

Id. at 75.

The court of appeals also strongly implied, although it did not hold, that the trial judge erred in requiring the INS to rebut Mr. Sanchez's prima facie case of citizenship by "clear, convincing, and unequivocal" evidence, instead of by a preponderance of the evidence, as in a typical civil case. According to the panel, the enhanced burden of proof at trial, like the "independent determination" review on appeal, only comes into play when there has been a "prior determination of citizenship." *Id.* at 74.

The court of appeals decision therefore distinguishes two types of citizenship cases. Cases in which there has been no prior

administrative determination of citizenship are to be treated as routine civil cases. The ordinary civil preponderance-of-the-evidence burden of proof applies at trial and, on appeal, the district court's decision will be affirmed unless it is clearly erroneous. Only when there is a prior administrative determination of citizenship is the case removed from the routine category. Only then must the INS prove to the district court's satisfaction that the individual is an alien by "clear, convincing, and unequivocal evidence." And only then, according to the court of appeals, must the appellate court review the evidence itself to guarantee that this exacting standard has been met. This is not, and ought not to be, the law.

ARGUMENT

I.

THE COURT OF APPEALS ERRED BY NOT MAKING AN INDEPENDENT DETERMINATION THAT THE HISTORIC FACTS AMOUNTED TO CLEAR, UNEQUIVOCAL, AND CONVINCING PROOF THAT FRANK SANCHEZ WAS BORN IN MEXICO.

In denaturalization cases, this Court has required that the government establish its allegations by clear, unequivocal, and convincing evidence. *Chaunt v. United States*, 364 U.S. 350 (1960); *Nowak v. United States*, 356 U.S. 660 (1958); *Baumgartner v. United States*, 322 U.S. 665 (1944). The same high burden of proof was once imposed upon the government in expatriation cases. *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Gonzales v. Landon*, 350 U.S. 920 (1955) (per curiam).[5]

The principles underlying these cases are two-fold. First, this Court has recognized that in citizenship cases the Court deals with "judgments lying close to opinion regarding the whole nature

[5] The clear, convincing, and unequivocal burden of proof no longer applies in expatriation cases because the Congress amended the relevant statutes in response to *Nishikawa*. *Vance v. Terrazas*, 444 U.S. 252 (1980), held that the lower burden of proof was constitutional, especially since the government was required to prove the individual *voluntarily* repudiated his citizenship. Even *Terrazas*, however, expressed a decided preference for the clear, convincing, and unequivocal evidence standard. 444 U.S. at 266.

of our Government and the duties and immunities of citizenship." *Baumgartner v. United States*, 322 U.S. at 671. "Rights of citizenship are not to be destroyed by an ambiguity." *Nishikawa v. Dulles*, 356 U.S. at 136, *citing Perkins v. Elg*, 307 U.S. 325 (1939). Aside from the constitutional sensitivity of citizenship issues, this Court has also based its judgment upon the grave consequences to a person to be denied or stripped of citizenship. Accordingly, where Congress has not prescribed the standards of proof, this Court has "stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence" from the government. *Vance v. Terrazas*, 444 U.S. 252, 266 (1980).

The principles of *Chaunt*, *Nowak*, *Baumgartner*, and *Nishikawa* have not been confined to citizenship cases. In *Woodby v. INS*, 385 U.S. 276 (1966), this Court applied the "clear, unequivocal, and convincing" burden of proof in administrative deportation proceedings even though such administrative proceedings may not include a claim of citizenship. After all, the "immediate hardship of deportation is often greater than that inflicted by denaturalization," and "many resident aliens have lived in this country longer and established stronger family, social and economic ties here than some who have become naturalized citizens." *Id.* at 286.

Along with imposing a strict burden of proof upon the government in citizenship cases, this Court has also imposed a high standard of appellate review. In *Chaunt v. United States*, this Court stated:

> The issue in these cases is so important to liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here . . . .

364 U.S. at 353. Moreover, in *Baumgartner v. United States*, this Court noted that the conclusion of citizenship that may be drawn from "the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court." 322 U.S. at 671. This Court has thus required the court of appeals to make an independent determination based on the historic facts as to whether or not the government has met its high burden of proof.

In *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970), the Court of Appeals for the Ninth Circuit held that in a case in which the sole issue is citizenship or alienage, the INS must prove alienage by clear, unequivocal, and convincing evidence once the individual establishes a prima facie case of citizenship. Moreover, the *Lim* court held that because of the grave consequences of the decision of alienage, the appellate court does not grant its usual deference to a district court's resolution of conflicting evidence. Rather, "[o]n appeal, this court must make an independent determination as to whether the evidence introduced by the Service was 'clear, unequivocal and convincing.'" 431 F.2d at 199. The *Lim* court explained that the policy behind this very heavy burden of proof was that a decision of alienage has drastic consequences for a person who has lived in America for a great many years reasonably believing that he is a citizen. A determination of alienage not only may subject the person involved to deportation, but also "may put in jeopardy the citizenship of others who have innocently claimed derivative citizenship from the same common ancestor." 431 F.2d at 200 n.4.

Lim v. Mitchell follows naturally from this Court's decisions in *Woodby, Nishikawa, Chaunt, Nowak* and *Baumgartner*. Congress has not addressed the standards of proof or standard of appellate review in de novo citizenship cases. Accordingly, it has been left to the judiciary to resolve these questions. *Woodby v. INS*, 385 U.S. at 284. This Court's cases evince a preference for imposing a high standard of proof and appellate review upon the government. This high standard of proof and scope of appellate review has been no stranger to the courts and has posed no problems in implementation. It has not occasioned a flood of litigation or thrown open the gates to the country. Rather, it accords procedural protection to a small but recurring number of cases where people claim citizenship by birth.

In this case, the Court of Appeals for the Ninth Circuit has departed from the mainstream of this Court's cases and deprived Mr. Sanchez and his Mexican-born children of United States citizenship. Henceforth, the Ninth Circuit will follow a judge-made rule that divides citizenship cases into two categories. The Ninth Circuit will impose a high standard of appellate review in citizenship

cases only if "there had been a prior determination of identity and citizenship by the Service upon which both the petitioner and the government had relied for many years." Where these facts do not exist, the Ninth Circuit will apply the deferential "clearly erroneous" standard of appellate review.

The court of appeals offers no rationale to divide citizenship cases into these two categories. None can be offered. The fourteenth amendment defines citizenship by birth or naturalization. This case involves citizenship by birth. Citizens by birth, who have believed all their lives they are U.S. citizens, and, like Mr. Sanchez, who have resided in the United States for decades, are the people least likely to seek a prior INS determination that they are citizens. Moreover, citizens by birth, like Mr. Sanchez, who were born over 50 years ago during the depression, will have the most difficult task of finding conclusive eyewitnesses to their birth. Although claims of citizenship by birth such as these should receive the highest judicial protection, the court of appeals gives them the least. Naturalized citizens, on the other hand, who necessarily will have a prior determination of citizenship, will be given the highest procedural protections by the court of appeals. There is no logic to exalting claims of citizenship by naturalization over claims of citizenship by birth.

Appellant concedes that not all citizenship cases merit the unusual procedural safeguards recognized in *Woodby* and *Chaunt*. Indeed, when the citizenship claim is first presented in a deportation proceeding, as it was here, the statutory scheme established by Congress in 8 U.S.C. § 1105a(a)(5) itself separates out cases which do not present an issue of material fact. If there is no genuine issue of material fact as to citizenship, then the INS's administrative determination of alienage must be affirmed if supported by substantial evidence. If there is a genuine issue of material fact, then the INS's determination is set aside and the case transferred to the district court for a trial de novo. *See Agosto v. INS*, 436 U.S. 748 (1978). The small number of reported cases on citizenship claims is proof that this statutory scheme is sufficient to separate the wheat from the chaff.

The Ninth Circuit has departed from this Court's teachings, however, by stating that the distinction between routine and extraordinary cases is to be found in the presence or absence of a "prior determination of citizenship by the Immigration Service." 714 F.2d at 74. Policies that warrant extraordinary procedural protections in certain types of citizenship and deportation cases cannot be reduced to such a simple, judicially-created formula. When an individual who has long reasonably believed himself to be a United States citizen suddenly finds his citizenship challenged by the government, whether in a denaturalization proceeding, a denationalization proceeding, a declaratory judgment action such as *Lim v. Mitchell*, or a section 1105a(a)(5) proceeding such as this, he is entitled to the greatest possible assurances that he will not lose his citizenship erroneously. It does not matter whether citizenship is based on a "prior determination of citizenship" by a federal agency or by the fact of birth. The unfairness and unsoundness of a test based solely on whether there has been a prior federal determination of citizenship is further illustrated by reference to the facts of this case.

II.

IF THE COURT OF APPEALS CONDUCTS AN INDEPENDENT REVIEW OF THE HISTORIC FACTS, THEN THE JUDGMENT WILL BE REVERSED.

The court of appeals decision does *not* state that the court of appeals would have reached the same decision as Judge Carroll if it had independently reviewed the historic facts. Indeed, of the three facts cited by the court of appeals to support Judge Carroll's finding, two of the facts are irrevelent, and all are subject to important countervailing evidence. The three facts are:

1. "Sanchez-Martinez does not have an American birth certificate." This is certainly true, but the evidence at trial established that there have been over 40,000 people born in Arizona who, for one reason or another, do not have original Arizona birth certificates. I RT 88. Alfonso Bravo, the manager of the vital records section of the Arizona department of Health Services explained the variety of ways in which this could happen. I RT 86-88, III RT 282-83. The absence of an Arizona birth certificate makes it all the

more understandable that Mr. Sanchez's father (or someone else) might have thought it desirable to obtain a birth record for the newly born child in their new home.

2. "All of his American-born siblings have American birth certificates." Frank's American born siblings — Rafaela, Luis, and Henry — do have Arizona birth certificates. This fact, however, does *not* tend to show that Frank was born in Mexico. The circumstances that can cause a child not to have an Arizona birth certificate are outside the control of the family; that one sibling has birth certificate has no bearing on the likelihood that another will not. Moreover, Rafaela, Luis and Henry are all older than Frank. When they were born the family was living permanently in Arizona. Frank Sanchez was born in 1933 just as the family was moving to Mexico — either shortly before, as he maintains, or shortly after, as the INS maintains. His father was already in Mexico. I RT 23, 27, 54, 104, II RT 143. These circumstances support an inference that the attending physician may not have thought it worth the trouble to prepare an Arizona birth certificate for a baby of a Mexican-heritage family in the process of moving to Mexico.

3. The court of appeals's third fact — "He has a Mexican birth certificate" — was the subject of extensive explanatory evidence. A Mexican birth certificate, unlike an Arizona birth certificate, is *not* generated by a physican or midwife. It is a narrative hearsay recital of what the registrar was told by the parent. I RT 89-90, II RT 193-210, III RT 279-80. Moreover, the Mexican certificate was not generated at the time of the birth, but two weeks later. Expert testimony established that such certificates, especially in small towns in the 1930's, were often unreliable and that their unreliability is illustrated by the existence of a relatively simple procedure for "rectifying" the information such records contain. Ex. 16.

The evidence of Mexican birth simply is not "unequivocal"; it *is* equivocal, the Mexican birth certificate above all. The affirmative evidence of Arizona birth is substantial and, on the crucial facts, self-consistent. As the government conceded at trial, "nobody knows for sure" where Frank Sanchez was born. III RT 318. There is significant doubt that he was born in Mexico. If the court of

appeals had made an "independent determination" of the evidence, it would have concluded that the INS's evidence "leaves the issue in doubt." *Lim v. Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970). Accordingly, the district court judgment would be reversed.

CONCLUSION

The Court of Appeals for the Ninth Circuit has decided an important federal question in conflict with the prior decisions of this Court. This case concerns not only the citizenship of Mr. Sanchez, but the citizenship of his Mexican-born children who have lived in America their entire lives and who have claimed derivative citizenship through their father. The petition for certiorari should be granted, and this Court should clearly articulate the standard of appellate review in citizenship cases. The case should then be remanded to the Court of Appeals for the Ninth Circuit to independently determine whether the historic facts establish by clear, convincing, and unequivocal evidence that Frank Sanchez was born in Mexico, or, this Court itself may decide this issue.

Respectfully submitted this 23rd day of January, 1984.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By _____

Colin F. Campbell
Ron Kilgard
Suite 4000
2700 North Third Street
Phoenix, Arizona 85004
Attorneys for Petitioner

No. _____

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

AFFIDAVIT OF SERVICE

COLIN F. CAMPBELL, being first duly sworn upon his oath, deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he mailed the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 on the 23rd day of January, 1984, and to Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, and Elizabeth Jucius Dunn, Assistant United States Attorney, 4000 United States Courthouse, 230 North First Avenue, Phoenix, Arizona 85025:

(a) Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit;

(b) Affidavit of Service.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By _____

Colin F. Campbell
Suite 4000
2700 North Third Street
Phoenix, Arizona 85004
Attorneys for Petitioner

SUBSCRIBED AND SWORN to before me this 23rd day of January, 1984, by Colin F. Campbell.

Lola M. Sands
Notary Public

My Commission Expires:

May 5, 1987

APPENDIX I

[714 F.2d 72]

Francisco SANCHEZ-MARTINEZ,
Petitioner-Appellant,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

CA No. 82-5501.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 15, 1983.
Decided June 13, 1983.

In deportation proceeding the Board of Immigration Appeals affirmed holding that petitioner was not a United States citizen. [714 F.2d 73] After de novo hearing, the United States District Court for the District of Arizona, Earl H. Carroll, J., concluded that petitioner was born in Mexico, and petitioner appealed. The Court of Appeals held that district court, which could have concluded that petitioner did not have American birth certificate, that all his American-born siblings had American birth certificates, and that he had Mexican birth certificate, did not err in determining that petitioner was not an American citizen.

Affirmed.

1. Aliens 54.3(4)

Where there had been no prior determination of citizenship, where petitioner's claim to United States citizenship was based solely on his own belief and recollections of others as to his putative birth in United States some 50 years ago, and where he did not claim his citizenship derivatively from United States citizen, no departure was justified from normal practice of rejecting district court's findings of fact only if they are clearly erroneous. Fed.Rules.Civ.Proc.Rule 52(a), 28 U.S.C.A.

2. Aliens 54.1(2)
Declaratory Judgment 342

In de novo district court hearing, citizen who is seeking a declaratory judgment on question of citizenship bears initial burden of proof while in proceedings before Immigration and Naturalization Service, citizen is in position of a defendant and thus in latter proceedings government bears initial burden of proof. Immigration and Nationality Act, § 106(a)(5), as amended, 8 U.S.C.A. § 1105a(a)(5); 28 U.S.C.A. § 2201.

3. Aliens 54.1(4)

District court, which after de novo hearing could properly have found that clear and convincing evidence established that petitioner did not have American birth certificate, that all his American-born siblings had American birth certificates and that he had Mexican birth certificate, did not clearly err in concluding that petitioner was not an American citizen. Immigration and Nationality Act, § 106(a)(5), as amended, 8 U.S.C.A. § 1005a(a)(5); 28 U.S.C.A. § 2201.

Ron Kilgard, Martori, Meyer, Hendricks & Victor, Phoenix, Ariz., for petitioner-appellant.

Elizabeth Jucius Dunn, Phoenix, Ariz., for respondent-appellee.

Appeal from the United States District Court for the District of Arizona.

Before DUNIWAY, SNEED and FARRIS, Circuit Judges.

PER CURIAM:

The Immigration and Naturalization Service initiated deportation proceedings against Francisco Sanchez-Martinez in 1974, alleging that he was not a citizen of the United States. The Service contended that he was born in Imuris, Mexico, while Sanchez-Martinez contended that he was born in Nogales, Arizona. The Immigration Judge held that he was not a United States citizen, and the Board of Immigration Appeals affirmed.

Sanchez-Martinez filed a petition for review with this court. We held that because he had made a non-frivolous claim to citizenship and had raised a genuine issue of material fact as to his place of

birth, he was entitled to a de novo hearing in the district court on the question of citizenship. 8 U.S.C. § 1105a(a)(5).

The district court ruled that the action was for a declaratory judgment pursuant to 28 U.S.C. § 2201 and 8 U.S.C. § 1105a(a)(5). Following a de novo hearing on the question of citizenship, the district court concluded that, although Sanchez-Martinez had established a prima facie case of citizenship, the Service had proved by clear, unequivocal, and convincing evidence that he was born in Mexico. We affirm.

The parties dispute the proper standard for appellate review of the district court's determination. Sanchez-Martinez argues that *Lim v. Mitchell*, 431 F.2D 197, 199 (9th Cir.1970) (quoting *Lee Hon Lung v. Dulles*, [714 F.2d 74] 261 F.2d 719, 724 (9th Cir.1958)), requires that on appeal we "make an independent determination as to whether the evidence introduced by the Service was 'clear, unequivocal, and convincing.' "

Lim, which involved unusual facts, does not provide the standard of review here. In *Lim* there had been a prior determination of identity and citizenship by the Service upon which both the petitioner and the government had relied for many years. Lim had claimed his citizenship derivatively from his grandfather, who was born in the United States. The government did not dispute the citizenship of the persons Lim claimed as his father and grandfather. The only issue was whether Lim was in fact the grandson of the man from whom he claimed his derivative citizenship. The district court found that Lim was not a citizen. We reversed, holding that, in light of the Service's prior determination of citizenship and Lim's reliance on it for more than thirty years, the district court had erred in concluding that the government had met its burden of proving by "clear, unequivocal, and convincing" evidence that Lim was not a United States citizen. *Lim*, 431 F.2d at 204.

In the present case there has been no prior determination of citizenship. Sanchez-Martinez's claim to United States citizenship is based solely on his own belief and the recollections of others as to his putative birth in the United States some fifty years ago. Further, Sanchez-Martinez does not claim his citizenship derivatively from a citizen of the United States. The facts of this case are not sufficiently similar to those of *Lim* to justify a departure from our normal practice of rejecting a district court's findings of fact only if clearly

erroneous. Fed.R.Civ.P. 52(a); *Yee Tung Gay v. Rusk*, 290 F.2d 630, 632 (9th Cir.1961).

The district court required the government to prove by "clear, unequivocal, and convincing" evidence that Sanchez-Martinez was not a citizen of the United States. In *Yee Tung Gay v. Rusk*, 290 F.2d at 631, we held that a petitioner in a declaratory judgment action in the district court to determine citizenship bore the initial burden of proving citizenship by a preponderance of the evidence. The government may then rebut this showing only by "clear, unequivocal, and convincing" evidence. *Lee Hon Lung v. Dulles*, 261 F.2d at 724. Like *Lim*, however, *Lee Hon Lung* involved a prior determination of citizenship by the Service. Whether the district court in the present case may have erred by imposing this heavy burden of rebuttal proof on the government in the absence of the special circumstances of *Lim* and *Lee Hon Lung* is not before us. Even though the proper burden may have been rebuttal by only a preponderance of the evidence, we do not decide this issue, since Sanchez-Martinez was not prejudiced if the district court held the government to a higher standard of proof than the law required.

In *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 286, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966), the Supreme Court held that in deportation proceedings before the Service, the government bears the initial burden of proving deportability by "clear, unequivocal, and convincing evidence." The *Woodby* standard is identical to the burden that we impose on the government in declaratory judgment actions in which there are special circumstances such as in *Lim* and *Lee Hon Lung*. We do not now decide whether such a standard is applicable in the district court to cases which do not have these special circumstances.[1] [714 F.2d 75]

---

1. The allocation of the initial burden of proof flows from the nature of the proceeding. In the de novo hearing in district court, the citizen is in the position of a plaintiff seeking a declaratory judgment. 8 U.S.C. § 1105a(a)(5); 28 U.S.C. § 2201. He or she bears the initial burden of proof. In proceedings before the Service, the citizen is in the position of a defendant. It follows that in these latter proceedings the government bears the initial burden of proof. *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362, establishes what this burden must be.We do

The district court could properly have found that the following facts were "clear, unequivocal, and convincing":

1) Sanchez-Martinez does not have an American birth certificate.
2) All of his American-born siblings have American birth certificates.
3) He has a Mexican birth certificate.

The district court was not clearly erroneous in concluding that these facts and other evidence, though disputed, were sufficient to support a determination that Sanchez-Martinez is not an American citizen.

Affirmed.

---

not decide whether *Woodby* alters our rule that a citizen seeking a declaration of citizenship in the district court is required to make an initial showing of citizen-[714 F.2d 75]ship by a preponderance of the evidence. *Yee Tung Gay v. Rusk*, 290 F.2d at 631.

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO SANCHEZ-MARTINEZ, Petitioner-Appellant,	)	CA No. 82-5501
	)	DC No. CIV 78-170
	)	ORDER
v.	)	(Arizona)
IMMIGRATION AND NATURALIZATION SERVICE, Respondent-Appellee.	)	
	)	

Before: DUNIWAY, SNEED, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Farris have voted to reject the suggestion for rehearing en banc and Judge Duniway would so recommend.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed October 26, 1983]

No. 83-1237

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Francisco Sanchez-Martinez,
Petitioner.

Colin F. Campbell
Ron Kilgard
MARTORI, MEYER,
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Attorneys for Petitioner

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*These two appendices, contained in the original appendix, are here reprinted for convenience.

APPENDIX I

[714 F.2d 72]

Francisco SANCHEZ-MARTINEZ,
Petitioner-Appellant,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

CA No. 82-5501.

United States Court of Appeals,
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Argued and Submitted April 15, 1983.
Decided June 13, 1983.

In deportation proceeding the Board of Immigration Appeals affirmed holding that petitioner was not a United States citizen. [714 F.2d 73] After de novo hearing, the United States District Court for the District of Arizona, Earl H. Carroll, J., concluded that petitioner was born in Mexico, and petitioner appealed. The Court of Appeals held that district court, which could have concluded that petitioner did not have American birth certificate, that all his American-born siblings had American birth certificates, and that he had Mexican birth certificate, did not err in determining that petitioner was not an American citizen.

Affirmed.

1. Aliens 54.3(4)

Where there had been no prior determination of citizenship, where petitioner's claim to United States citizenship was based solely on his own belief and recollections of others as to his putative birth in United States some 50 years ago, and where he did not claim his citizenship derivatively from United States citizen, no departure was justified from normal practice of rejecting district court's findings of fact only if they are clearly erroneous. Fed.Rules.Civ.Proc.Rule 52(a), 28 U.S.C.A.

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In de novo district court hearing, citizen who is seeking a declaratory judgment on question of citizenship bears initial burden of proof while in proceedings before Immigration and Naturalization Service, citizen is in position of a defendant and thus in latter proceedings government bears initial burden of proof. Immigration and Nationality Act, § 106(a)(5), as amended, 8 U.S.C.A. § 1105a(a)(5); 28 U.S.C.A. § 2201.

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Appeal from the United States District Court for the District of Arizona.

Before DUNIWAY, SNEED and FARRIS, Circuit Judges.

PER CURIAM:

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Sanchez-Martinez filed a petition for review with this court. We held that because he had made a non-frivolous claim to citizenship and had raised a genuine issue of material fact as to his place of

birth, he was entitled to a de novo hearing in the district court on the question of citizenship. 8 U.S.C. § 1105a(a)(5).

The district court ruled that the action was for a declaratory judgment pursuant to 28 U.S.C. § 2201 and 8 U.S.C. § 1105a(a)(5). Following a de novo hearing on the question of citizenship, the district court concluded that, although Sanchez-Martinez had established a prima facie case of citizenship, the Service had proved by clear, unequivocal, and convincing evidence that he was born in Mexico. We affirm.

The parties dispute the proper standard for appellate review of the district court's determination. Sanchez-Martinez argues that *Lim v. Mitchell*, 431 F.2D 197, 199 (9th Cir.1970) (quoting *Lee Hon Lung v. Dulles*, [714 F.2d 74] 261 F.2d 719, 724 (9th Cir.1958)), requires that on appeal we "make an independent determination as to whether the evidence introduced by the Service was 'clear, unequivocal, and convincing.' "

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In the present case there has been no prior determination of citizenship. Sanchez-Martinez's claim to United States citizenship is based solely on his own belief and the recollections of others as to his putative birth in the United States some fifty years ago. Further, Sanchez-Martinez does not claim his citizenship derivatively from a citizen of the United States. The facts of this case are not sufficiently similar to those of *Lim* to justify a departure from our normal practice of rejecting a district court's findings of fact only if clearly

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1. The allocation of the initial burden of proof flows from the nature of the proceeding. In the de novo hearing in district court, the citizen is in the position of a plaintiff seeking a declaratory judgment. 8 U.S.C. § 1105a(a)(5); 28 U.S.C. § 2201. He or she bears the initial burden of proof. In proceedings before the Service, the citizen is in the position of a defendant. It follows that in these latter proceedings the government bears the initial burden of proof. *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362, establishes what this burden must be.We do

The district court could properly have found that the following facts were "clear, unequivocal, and convincing":

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2) All of his American-born siblings have American birth certificates.
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The district court was not clearly erroneous in concluding that these facts and other evidence, though disputed, were sufficient to support a determination that Sanchez-Martinez is not an American citizen.

Affirmed.

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not decide whether *Woodby* alters our rule that a citizen seeking a declaration of citizenship in the district court is required to make an initial showing of citizen-[714 F.2d 75]ship by a preponderance of the evidence. *Yee Tung Gay v. Rusk*, 290 F.2d at 631.

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO SANCHEZ-MARTINEZ, Petitioner-Appellant,	)	CA No. 82-5501
	)	DC No. CIV 78-170
	)	ORDER
v.	)	(Arizona)
IMMIGRATION AND NATURALIZATION SERVICE, Respondent-Appellee.	)	
	)	

Before: DUNIWAY, SNEED, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Farris have voted to reject the suggestion for rehearing en banc and Judge Duniway would so recommend.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed October 26, 1983]

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANCISCO SANCHEZ-MARTINEZ, Petitioner, vs. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	[Filed January 7, 1982] NO. CIV 78-170 PHX-EHC FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter was tried to the Court on October 21, 22, and 23, 1981, and was taken under advisement.

The Court having reviewed the exhibits and memoranda of the parties, and being fully advised, enters findings of fact, conclusions of law, and order as follows:

FINDINGS OF FACT

1. On October 24, 1974, the Immigration and Naturalization Service (INS) commenced deportation proceedings against Francisco Sanchez-Martinez (Petitioner or Frank Sanchez).

2. The sole issue in the deportation proceedings was the citizenship of Petitioner.

3. The INS contends Petitioner is a citizen of Mexico having been born in Imuris, Sonora, Mexico on November 29, 1933. Petitioner claims that he was born the same date in Nogales, Arizona.

4. On November 6, 1974, the Immigration Judge after a hearing ruled that Petitioner was not a citizen of the United States. Petitioner timely appealed to the Board of Immigration Appeals, which was heard July 19, 1976. His appeal was dismissed August 17, 1976. Petitioner was ordered deported, if he did not voluntarily depart from the United States within thirty (30) days of the Board's order.

5. Petitioner filed a petition for review with the United States Court of Appeals, Ninth Circuit, seeking transfer of the proceeding to the District Court for a *de novo* determination of Petitioner's citizenship. The Court of Appeals issued a Memorandum decision November 14, 1977, granting the petition for review, setting aside the order of the Immigration Board and remanding the matter "with directions to transfer the proceedings to the United States District Court for the District of Arizona for a *de novo* determination of petitioner's claim to citizenship." This proceeding was filed in U.S. District Court March 6, 1978.

6. Petitioner was born November 29, 1933, and is the son of Luis Tapia-Sanchez and Carmen Martinez de Sanchez. Both parents are deceased.

7. Petitioner has the following living brothers and sister:

NAME	DATE AND PLACE OF BIRTH
Armando	January 31, 1917, Mexico
Rafaela	October 24, 1926, Nogales, Arizona
Luis	August 2, 1928, Nogales, Arizona
Enrique	July 15, 1931, Nogales, Arizona

8. The births of Rafaela, Luis and Enrique were properly registered and a Certificate of Birth issued by the Arizona State Board of Health, Bureau of Vital Statistics. The birth of each child was attended by a midwife.

9. Luis and Carmen Sanchez returned to Mexico in 1933, and they left Armando and Luis in Nogales, Arizona to complete the school year. Armando and Luis attended public school in Nogales, Arizona, through the school year ending in May, 1933.

10. There is no contemporaneous record of Petitioner's birth in Nogales, Arizona. Petitioner was baptized as Francisco Martinez in Nogales, Arizona on August 30, 1936. The baptismal record shows residence as Nogales, Arizona.

11. Luis and Carmen Sanchez returned to Mexico prior to Petitioner's birth. Petitioner was born in the District of Imuris, Republic of Mexico on November 29, 1933. His birth in Mexico was registered on December 15, 1933.

12. Petitioner has always believed that he was born in Nogales, Arizona, based on conversations with his father and mother. This belief was shared by his brothers and sister.

13. Petitioner entered the United States in 1951, registered for the military draft in 1952, and was issued a draft card. The original draft card was lost in the mid-50s and he was issued a copy, which he still retains. The draft card shows Petitioner's place of birth as Nogales, Arizona.

14. Petitioner obtained a social security card in the mid-50s and he reported his place of birth as Nogales, Arizona.

15. In 1964, Petitioner registered the births of several of his children in Mexico and he claimed Nogales, Arizona as his place of birth.

16. Petitioner was advised in 1972 of his Mexican birth certificate during an investigation of his citizenship by the INS.

17. Petitioner applied for a delayed birth certificate from the State of Arizona in 1975 and he did not advise the state agency of the existence of the Mexican birth certificate, or the INS proceeding.

18. The testimony presented on behalf of Petitioner to establish his birth in Nogales, Arizona, was confusing, inconsistent and improbable. Several of the witnesses were relatives of Petitioner and as such, were interested in the proceeding.

19. Petitioner was convicted in October, 1980, of aiding and abetting in Transporting Illegal Aliens, a felony, in violation of Title 18, U.S.C. § 2 and Title 8, U.S.C. § 1324(a)(2), CR-80-39-PHX-RMB.

CONCLUSIONS OF LAW

1. This is a declaratory judgment action under 8 U.S.C. § 1105a(a)(5)(B) and 28 U.S.C. 2201 in which Petitioner seeks a judgment declaring that he is a natural born citizen of the United States.

2. There is no provision in the statutes conferring citizenship solely on the basis of long residence in the United States.

3. The Court, in a *de novo* proceeding, determines the credibility and weight to be given testimony.

4. Assuming that Petitioner established by a fair preponderance of the evidence that his claim of United States citizenship was not frivolous, the burden of proof shifted to the INS to prove by clear and convincing evidence that he was not a United States citizen.

5. There is no contemporaneous record made by governmental authority of Petitioner's birth in Nogales, Arizona on November 29, 1933, or otherwise.

6. There is a contemporaneous record made by governmental authority in official records of Petitioner's birth in the District of Imuris, State of Sonora, Republic of Mexico on November 29, 1933.

7. It was not necessary to present a birth certificate in 1952 when Petitioner registered for the military draft.

8. It was not necessary to present a birth certificate when Petitioner obtained a social security card in 1955.

9. Respondent INS has proved by clear and convincing evidence, including cross-examination of Petitioner's witnesses, that Petitioner is not a natural born citizen of the United States.

Accordingly,

IT IS ORDERED that Respondent Immigration and Naturalization Service serve and lodge a proposed form of Judgment within ten (10) days of this Order.

Dated this 5th day of January, 1982.

[signed, Earl H. Carroll]
U.S. District Judge

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANCISCO SANCHEZ-MARTINEZ, Petitioner,	)	[Filed January 28, 1982]
vs.	)	
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	CIV-78-170-PHX-EHC
	)	JUDGMENT

This action came for hearing before the Court, Honorable Earl H. Carroll, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is ordered and adjudged that Petitioner is not a natural born citizen of the United States and that Respondent recover of Petitioner its costs of action.

DATED this 27th day of January, 1982.

[signed, Earl H. Carroll]
Earl H. Carroll,
United States District Judge

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANCISCO SANCHEZ-MARTINEZ,	)	
Plaintiff,	)	[Filed June 21, 1982]
vs.	)	
U.S IMMIGRATION AND NATURALIZATION SERVICE,	)	NO. CIV 78-170 PHX-EHC
Defendant.	)	

TRIAL PROCEEDINGS/MOTION

Before: THE HONORABLE EARL H. CARROLL, JUDGE

Phoenix, Arizona
October 23, 1981
March 29, 1982

VOLUME III
(Pp 235 to 348)

Appearances:

For the Plaintiff: WILLIAM J. MALEDON and RON KILGARD Attorneys at Law

For the Defendant: ELIZABETH JUCIUS and JOHN HOLYA Asst. U.S. Attorneys

MR. KILGARD: I have nothing further.

THE COURT: Thank you.

There will be an order in the following respects, that with respect to finding number 8, I will add the additional sentence that "each child named there was born at an address on Elm Street and was delivered by a midwife."

With respect to finding 9, that the reference to Luis should be Manuel.

In other words, that Armando and Manuel attended school in Nogales, Arizona, through the school year ending in May, 1933.

Further that the testimony reflected that the family left Nogales, Arizona, and returned to Mexico prior to the end of the school year in May, 1933.

With respect to finding 16, in 1973, Petitioner's father told an INS official that Petitioner was born in Nogales, Arizona, that Petitioner's brother, Luis, was acting as an interpreter in that instance and the record of the interview also indicated confusion as to some matters on the part of the father.

I have already indicated my opinion with reference to clear, convincing and unequivocal and clear and convincing.

With respect to finding number 6 — or conclusion number 6, it will be amended to read as follows: "There is a record dated December 15, 1933, made by Governmental authority, an official record of Petitioner's birth in the District of Imuris, State of Sonora, Republic of Mexico on November 29, 1933. The Court concludes this is a contemporaneous record made so close in time to the birth as not to infer a fabrication."

In other respects, then, the motions pending are denied.

I take it we do have his status clarified at least for everyone's satisfaction pending the appeal?

Is that correct?

MR. KILGARD: As far as I am concerned, your Honor, yes.

THE COURT: Thank you, Mr. Kilgard. Thank you Mr. Holya.

(Whereupon the above proceedings were terminated.)

APPENDIX VI

CIVIL MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PLACE: PHOENIX

Judge	Deputy Clerk	Court Reporter
/ / HON C. A. MUECKE	/ / Rita Zambonini	/ / Gloria Frandle
/ / HON WILLIAM P. COPPLE	/ / Becky Daudet	/ / Tom Stalcup
/ / HON VALDEMAR A. CORDOVA	/ / Phyllis Martin	/ / Bill McNutt
/ / HON CHARLES L. HARDY	/ / Meredith Ingle	/ / Jean Moll
/X/ HON EARL H. CARROLL	/X/ Sally Feight	/X/ Bridget Brittan
/ / HON WALTER E. CRAIG	/ / Dorothy Ewart	/ / Ted Behrens
/ /		

CIV- 78-170 PHX EHC

Francisco Sanchez-Martinez (Plaintiff) vs. Immigration & Naturalization Service (Defendant)

DOCKET NUMBER — MATTER ON FOR HEARING — / / Contd on reverse

(78) Motion for New Trial or in the Alternative to Amend the Findings of Fact & Conclusions of Law

APPEARANCES — / / Contd on reverse

Ron Kilgard for Plaintif;
Elizabeth Jucius and John Holya for Defendants

MINUTES — / / Contd on reverse

Motion argued. ORDER that the motion is granted in part and denied in part. Findings #8, #9 and #16 are amended as well as conclusion #6. The Motion is denied in all other respects.

/ / Under Advisement / / Notice to Counsel / / Vacated Contd to: _____

DOCKETED BY:

DATE: March 29, 1982 [signed, Janice Garcia]
Deputy Clerk

CIV-1 (2/4/82)

No. 83-1237

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

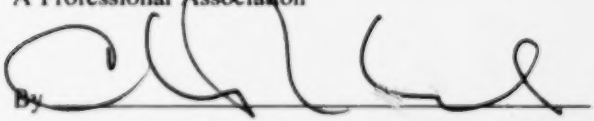
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

AFFIDAVIT OF MAILING AND SERVICE

COLIN F. CAMPBELL, being first duly sworn upon his oath, deposes and says:

That on the 31st day of January, 1984, he mailed this Supplemental Appendix to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, to Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, and to Elizabeth Jucius Dunn, Assistant United States Attorney, 4000 United States Courthouse, 230 North First Avenue, Phoenix, Arizona 85025.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By 

Colin F. Campbell
Suite 4000
2700 North Third Street
Phoenix, Arizona 85004
Attorneys for Petitioner

SUBSCRIBED AND SWORN to before me this 27th day of January, 1984, by Colin F. Campbell.

Lela M. Sands
Notary Public

My Commission Expires:

May 5, 1987

No. 83-1237

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF AND SUGGESTION FOR REMAND

Francisco Sanchez-Martinez,
Petitioner.

Colin F. Campbell
Ron Kilgard
MARTORI, MEYER,
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Attorneys for Petitioner

This Supplemental Brief is submitted pursuant to Rule 22.6 of the Supreme Court Rules. Petitioner in the above-captioned case, Francisco Sanchez-Martinez, has asked this Court to grant his petition for certiorari in order to hear and decide the question whether the "clearly erroneous" standard of appellate review is the appropriate standard where the question before the appellate court involves a claim of citizenship by birth. We have argued in our petition that a close, independent review of the record is necessary in light of the constitutionally protected right of a citizen by birth to continue to enjoy the benefits of that status. The United States in its response has argued that the rule 52 "clearly erroneous" standard is the appropriate appellate standard.

On Monday of this week, April 30, 1984, this Court decided a case involving the question whether the rule 52 "clearly erroneous" standard constituted the proper standard for reviewing issues of fact in a libel case. *Bose Corporation v. Consumers Union*, No. 82-1246. We submit that the Court's analysis there is fully applicable to the *Sanchez-Martinez* case: where fundamental constitutional rights hang in the balance, judges reviewing the findings of fact at the appellate level have a duty, which cannot be delegated to the trier of fact, to review independently those findings. The two cases are particularly close because in both cases the underlying questions of fact were determined based upon the "clear and convincing" standard at the district court level.

Given the close similarity of the issues involved, and given the fact that the principles applicable to both cases spring from the same constitutionally-based principles, we suggest that it would be appropriate for this Court to remand this case to the Ninth Circuit Court of Appeals for reconsideration in light of *Bose Corporation v. Consumers Union*, No. 82-1246. While it remains this Petitioner's first preference to have his case heard and decided by this Court, we recognize that considerations of efficiency may warrant this more expeditious method of resolution.

Respectfully submitted this 4th day of May, 1984.

MARTORI, MEYER, HENDRICKS
& VICTOR
A Professional Association

By _____

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No. 83-1237

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

AFFIDAVIT OF SERVICE

COLIN F. CAMPBELL, being first duly sworn upon his oath, deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he mailed forty copies of the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 on the 4th day of May, 1984; and three copies each to Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530; Elizabeth Jucius Dunn, Assistant United States Attorney, 4000 United States Courthouse, 230 North First Avenue, Phoenix, Arizona 85025; Steve Bomse, Heller, Ehrman, White & McAuliffe, 44 Montgomery Street, San Francisco, California 94104; and Morris J. Baller, Mexican American Legal Defense and Educational Fund, 28 Geary Street, San Francisco, California 94108:

(a) Supplemental Brief and Suggestion for Remand;

(b) Affidavit of Service.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By _____
Colin F. Campbell
Suite 4000
2700 North Third Street
Phoenix, Arizona 85004
Attorneys for Petitioner

SUBSCRIBED AND SWORN to before me this 4th day of May, 1984, by Colin F. Campbell.

_____
Notary Public

My Commission Expires:

_____

No. 83-1237

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the evidence was sufficient to support the district court's judgment that petitioner is not a national of the United States.

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v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 714 F.2d 72. The opinion of the district court (Pet. Supp. App. A7-A10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. A petition for rehearing was denied on October 26, 1983 (Pet. App. A6). The petition for a writ of certiorari was filed on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 24, 1974, the Immigration and Naturalization Service instituted deportation proceedings against petitioner on the ground that he had entered the United States without a valid entry document, in violation of 8 U.S.C. 1251(a)(1). The sole contested issue at the deportation hearing was whether petitioner was a natural born

citizen of the United States. On the basis of evidence that petitioner was born in 1933 in Imuris, Sonora, Mexico, the immigration judge concluded that petitioner was not a United States citizen and hence was deportable. The Board of Immigration Appeals affirmed. On petition for review, the court of appeals held that petitioner had raised a nonfrivolous claim to American citizenship; accordingly, it transferred the proceedings to the United States District Court for the District of Arizona pursuant to 8 U.S.C. 1105a(a)(5) for a de novo hearing on petitioner's claim.

2. At trial, petitioner's Mexican birth was established by evidence of the official registration of his birth in that country, and by evidence that, while Arizona law required the registration of all births within the State and the births of petitioner's Arizona-born siblings were so registered, a search of the state records disclosed no birth registration for petitioner.

The evidence showed that petitioner's birth in Mexico on November 29, 1933, was registered in Imuris, a district capital, on December 15, 1933; the registration was signed by petitioner's father and stated that birth had occurred "in this town" (E.R. 75). The birth was also registered in Hermosillo, the capital of the State of Sonora (E.R. 67). A Mexican official testified that under Mexican law birth registration takes place in the district capital and duplicates are sent annually to the state capital (Tr. 218). The newborn child must be physically presented to the registrar (Tr. 193-196), and hence there is normally a delay between birth and registration. The parents of a child born in the United States can have the birth registered in Mexico; in such a case, the Mexican registration will reflect the United States birth (Tr. 232).

To support his contention that he had been born in Nogales, Arizona, petitioner offered a baptism certificate issued in that town in 1936 which stated that Nogales was

his residence (Tr. 54-55; Exh. D). In addition, petitioner's oldest brother and a family friend testified that petitioner had been born in Nogales, and petitioner's three younger siblings testified that it was common knowledge within the family that petitioner had been born in Nogales. The oldest brother and the family friend each testified that the family returned to Mexico after petitioner's birth, but that the two oldest boys remained behind to complete school (Tr. 23, 26, 42, 54). The district court found, in this regard, that petitioner's parents returned to Mexico in 1933, leaving petitioner's two oldest brothers in Nogales to complete the school year, and that the brothers attended public school in Nogales "through the school year ending in May, 1933" (Pet. Supp. App. A8).

At the conclusion of the trial, the district court held that the INS had established "by clear and convincing evidence, including cross-examination of [p]etitioner's witnesses, that [p]etitioner is not a natural born citizen of the United States" (Pet. Supp. App. A10). In reaching this result, the court pointed out that there was no contemporaneous official record of petitioner's birth in Nogales, Arizona, and that there was a contemporaneous official record of petitioner's birth in Imuris, Sonora, Mexico, on November 29, 1933 (*ibid.*).

3. On appeal, petitioner argued (Pet. C.A. Br. 20) that, because of the nature of the proceeding, the court of appeals could not defer to the district court's resolution of the conflicting evidence, but had to weigh the evidence independently. In response, the government contended (Gov't C.A. Br. 10) that it was up to the trier of fact to weigh the evidence and that the district court's factual determinations should be upheld on appeal unless clearly erroneous.

The court of appeals affirmed (Pet. App. A1-A5). The court first concluded that it would not depart from its "normal practice of rejecting a district court's findings of fact only if clearly erroneous" (*id.* at A3-A4, citing Fed. R. Civ. P. 52(a)). It then ruled that the district court's findings of fact were not clearly erroneous and that the district court properly could have concluded that the evidence — including petitioner's Mexican birth certificate, his lack of a United States birth certificate, and the fact that all of his American-born siblings possessed United States birth certificates—was sufficient, under the clear and convincing proof standard, to establish that petitioner is not a natural born United States citizen (Pet. App. A5).

ARGUMENT

Petitioner contends that the court of appeals failed to review the sufficiency of the evidence under the clear and convincing test, but instead applied the clearly erroneous standard. Petitioner's contention is based on a misreading of the court of appeals' opinion. Although the court's opinion is somewhat ambiguous in this regard (see Pet. App. A5), it seems tolerably clear that the court determined first, that the district court's findings of fact were not clearly erroneous, and second, that based on those findings, there was sufficient support in the record for the district court's conclusion that petitioner's Mexican birth was established by clear and convincing evidence.[1]

---

[1]The court of appeals' decision is thus fully consistent with such cases as *Chaunt* v. *United States*, 364 U.S. 350 (1960), and *Baumgartner* v. *United States*, 322 U.S. 665 (1944), in which this Court observed that a reviewing court must make an independent determination whether the government has met its burden of proof. To the extent that petitioner suggests (Pet. 17) that the reviewing court is also required to weigh the evidence and make de novo findings of fact, he is in error. This would render the district court proceedings essentially superfluous because it would require the reviewing court to redo precisely what the trial court

This fact-bound determination is clearly correct and does not warrant review. The evidence of record, when viewed (as it must be) in the light most favorable to the government, meets the "clear, unequivocal and convincing proof" test. Petitioner's contrary argument rests on the consideration in isolation of the facts that his birth was registered in Mexico and not in Arizona, and that the births of his Arizona-born siblings were registered in that State. Whatever evidentiary force these facts may individually lack, taken together they make a clear and convincing case that petitioner was born in Mexico—particularly in light of the evidence concerning Mexican birth registration procedures (see page 2, *supra*).[2]

---

has done, but without the benefit of having heard the witnesses. See *Agosto* v. *INS*, 436 U.S. 748, 757 (1978). The Court in *Chaunt* and *Baumgartner* did not suggest any departure from the usual rule that findings of a trial court with respect to historical facts are subject to review on the basis of the "clearly erroneous" standard. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 286-287 n.16 (1982). Application of the clearly erroneous standard is particularly appropriate here because the district court's findings of fact underlying its resolution of petitioner's nationality claim involved assessment of the credibility of the witnesses who testified at the trial (Pet. Supp. App. A9). See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 122-123 (1969).

Petitioner asserts (Pet. 17-19) that a conflict exists between the decision of the court below in this case and its prior decision in *Lim* v. *Mitchell*, 431 F.2d 197 (9th Cir. 1970). This Court, of course, does not resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In addition, we note that the government's evidence in *Lim* consisted primarily of internally inconsistent statements from witnesses who did not testify at trial; thus, the district court was in no better position than the reviewing court to pass upon the witnesses' credibility. Moreover, unlike here, the government in *Lim* had no external, corroborative documentation of foreign birth.

[2]Indeed, petitioner's claim that he was born in Arizona is disproved by his own evidence. He does not dispute that he was born in November 1933. It was the testimony of petitioner's witnesses that, when his family returned to Mexico, his two oldest brothers remained behind to complete the school year (Tr. 23, 26, 42, 54). The district court found (Pet. Supp. App. A8) and the record showed (E.R. 69-74), however, that the brothers completed their American schooling in May 1933—six months before petitioner's birth.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

APRIL 1984

DOJ-1984-04

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No. 83-1237

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Francisco Sanchez-Martinez,
Petitioner.

Colin F. Campbell
Ron Kilgard
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(602) 263-8700

Attorneys for Petitioner

ARGUMENT

Respondent's characterization of the court of appeals' opinion is contrived. There is nothing ambiguous about the opinion. The sole issue on appeal was the proper standard of appellate review from the district court's determination of citizenship. 714 F.2d at 73-74. The court of appeals expressly rejected the "independent determination" standard of review, and applied a "clearly erroneous" standard of review. 714 F.2d at 74. It is more than "tolerably clear" that the court of appeals broke new ground and built a separate rule of law for citizens by birth as opposed to citizens by naturalization.

Respondent suggests that this Court's cases require an appellate court to apply the "clearly erroneous" standard of review to historic facts and, then, determine if these historic facts are sufficient to support the district court's conclusions on citizenship. According to Respondent, the historic facts are to be viewed in the light most favorable to the government. *But see Schneiderman v. United States*, 320 U.S. 118, 122 (1943) ("we believe the facts and law should be construed as far as is reasonably possible in favor of the citizen"). This standard is simply a formulation of the "clearly erroneous" standard of review. It calls for affirmance of a citizenship case if there is some evidentiary support in the record. Whatever Respondent calls this standard of review, it does not require the court of appeals to exercise an independent judgment on the constitutional fact of citizenship. In *Baumgartner v. United States*, 322 U.S. 665 (1944), this Court rejected the test proposed by the Repondent and stated:

> Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing proof" . . . on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts," not open to review here.

Id. at 671.

Finally, Respondent suggests that the district court's "fact-bound determination" is clearly correct. Of course, it is whether such an independent review of the whole record should be made which is at issue in this case. The court of appeals did not conduct one in this case and will not conduct one in future citizenship cases involving citizenship by birth. If an independent review is required, then the Court can remand to the court of appeals for this purpose or review the record itself. Petitioner submits that after a review of the whole record the Court "cannot escape the conviction that the case made out by the government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of a citizen." *Id.* at 670.

CONCLUSION

In sum, Petitioner submits that three conclusions emerge with clarity from the briefs filed in connection with this petition. First, the court below has embraced an approach to the review of citizenship questions that is inconsistent with the decisions of this Court. Second, the subject matter raises important questions worthy of this Court's attention — questions of constitutional significance not only for this Petitioner but also for a large but undeterminable number of other "undocumented" native-born citizens. Third, the record in this case provides a peculiarly appropriate vehicle for the resolution of these questions. The case was fully litigated below, and the record amply identifies the factual issues that require close appellate examination. For these reasons, Francisco Sanchez-Martinez petitions this Court to undertake a review on the merits.

DATED this 27th day of April, 1984.

MARTORI, MEYER, HENDRICKS
& VICTOR
A Professional Association

By _____
Colin F. Campbell
Ron Kilgard
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2700 North Third Street
Phoenix, Arizona 85004

No. 83-1237

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

AFFIDAVIT OF SERVICE

COLIN F. CAMPBELL, being first duly sworn upon his oath, deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he mailed forty copies of the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 on the 27th day of April, 1984; and three copies each to Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530; Elizabeth Jucius Dunn, Assistant United States Attorney, 4000 United States Courthouse, 230 North First Avenue, Phoenix, Arizona 85025; Steve Bomse, Heller, Ehrman, White & McAuliffe, 44 Montgomery Street, San Francisco, California 94104; and Morris J. Baller, Mexican American Legal Defense and Educational Fund, 28 Geary Street, San Francisco, California 94108:

(a) Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit;

(b) Affidavit of Service.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By _____

Colin F. Campbell
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Attorneys for Petitioner

SUBSCRIBED AND SWORN to before me this 27th day of April, 1984, by Colin F. Campbell.

_____

Notary Public

My Commission Expires:

_____

No. 83-1237

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Respondent.

BRIEF OF AMICI CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND AMERICAN G.I. FORUM OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF AMICI CURIAE

Amicus Curiae American G.I. Forum of the United States, is a national hispanic veterans' organization with a membership of over 100,000 founded in 1948 in Corpus Christi, Texas. The largest number of G.I. Forum's members are in Texas and other border states, which have in past decades had large populations of Mexican-American families which migrated back and forth across the border. Many of G.I. Forum's members have encountered native-born citizens of Mexican heritage who, like petitioner, cannot document their birth.

Amicus curiae Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights law organization dedicated to protecting and extending the rights of Mexican Americans. MALDEF has vast experience and contact with Mexican American citizens in all areas of the country, of all ages, and from all social, economic, and family backgrounds. In the course of these contacts, we have become aware that the plight of

petitioner in this case is by no means uncommon among Mexican Americans of older generations.

II. INTRODUCTION

MALDEF and G.I. Forum respectfully submit this brief amicus curiae in support of petitioner's request for review of the holding by the Ninth Circuit Court of Appeals that a decision rejecting a claim of United States citizenship under 8 U.S.C. §1105a(a)(5) must be affirmed unless it is "clearly erroneous." Upon that seemingly narrow issue turns the right of petitioner and his children to the most "precious" liberty -- "the right to have rights" -- to which an individual in this country can lay claim. Schneiderman v. United States, 320 U.S. 118, 125 (1943); Perez v. Brownell, 356 U.S. 44, 64 (1958), overruled on other grounds, Afroyim v. Rusk, 387 U,S. 253 (1967). Amici submit this brief because the issue petitioner presents for review is likely to be similarly determinative in many cases involving Mexican-Americans.

In light of the obvious importance of the constellation of rights surrounding citizenship, this Court has repeatedly held the government to an exacting standard of proof in cases involving citizenship and related matters. The decision below not only represents an inexplicable departure from this stringent standard, but creates a distinction between citizenship based on "naturalization" and "birth" which is incapable of defense on any principled basis. Indeed, we submit that a standard of review which places in greater jeopardy the rights of persons who claim their citizenship through birth rather than naturalization is untenable on its face. Moreover, the impact of the decision below will fall harshly upon many thousands of United States citizens situated similarly to petitioner. While the specific issue decided by the Ninth Circuit has not been resolved by this Court, decisions in closely related cases demonstrate not only the need for review, but the manifest error of the holding below.

III. REASONS FOR GRANTING THE WRIT

A. The Standard of Appellate Review of District Court Nationality Determinations Involves a Matter of Exceptional Importance.

The issue presented by this case is whether the Court of Appeals in a proceeding under 8 U.S.C §1105a(a)(5) must independently determine whether the government has shown by "clear, unequivocal and convincing" evidence that a person who it seeks to deport as an alien is, in fact, an alien and not a citizen of the United States. There can be no doubt from a review of the record in this case or even the Ninth Circuit's cautious opinion that if such review is required, Mr. Sanchez will be permitted to remain in this country as an American citizen, along with his children who claim their citizenship through him.

Amici submit that the summary treatment of this matter by the Court of Appeals fails to recognize either the importance or the complexity of the issue presented; nor, with all respect, does it reflect a fair appreciation of the Congressional scheme underlying

determinations of citizenship or this Court's consistent approach to that issue.

1. This Court has spoken repeatedly, and with fervor, of the importance attached to the right to be a citizen, or even to remain a resident, of this country. Citizenship has been described as a "precious" right (Fedorenko v. United States, 449 U.S. 490, 505 (1981) and as "man's basic right for it is nothing less than the right to have rights." (Perez v. Brownell, supra, 356 U.S. at 64 (Warren, C.J., dissenting). "It would be difficult to exaggerate its value and importance." Schneiderman v. United States, supra, 320 U.S. at 122. The consequence of its loss "is more serious than a taking of one's property or the imposition of a fine or other penalty." Schneiderman, supra. Indeed, loss of citizenship, or an order of deportation, "may result in the loss 'of all that makes life worth living'." Knauer v. United States, 328 U.S. 654, 659 (1946) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)). Yet for

the vast majority of people in the United States, citizenship is taken for granted and never becomes more than a momentary, and perfunctory, issue in their lives.

Such issues arise with greater frequency among persons who have come to this country as aliens and seek either to reside here permanently or to obtain American citizenship through naturalization. For obvious reasons the government imposes conditions on aliens and persons seeking to become naturalized citizens that it may not impose upon persons who have acquired their citizenship by birth or descent. Foremost among those conditions is that the government may -- in limited circumstances -- deport aliens or revoke the citizenship of naturalized Americans.

2. We begin with that rather elementary discussion because the basic taxonomy noted above (aliens, naturalized citizens, citizens by birth) is critical to an understanding of why review should be granted in this case. Given the recognized importance of

the rights at issue, this Court has consistently held that the citizenship of a naturalized American may be revoked only where the government establishes its case for denaturalization by "clear, unequivocal and convincing" evidence. Schneiderman v. United States, supra, 320 U.S. 118; Baumgartner v. United States, supra, 322 U.S. 665; ; Nowak v. United States, 356 U.S. 660 (1958); Chaunt v. United States, 364 U.S. 350 (1960); Fedorenko v. United States, supra, 449 U.S. at 505-06.[1] Moreover, on appeal from a determination adverse to the citizen, the lower court's decision is subject to "independent determination" by the reviewing court. As this Court noted in Chaunt v. United States, supra, 364 U.S. at 353:

> The issue in [denaturalization] cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here . . . .

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1 That standard "in effect approximates the burden demanded for conviction in criminal cases . . . ." Klapprott v. United States, 335 U.S. 601, 617 (1949) (Rutledge, J. concurring).

See also Baumgartner v. United States, supra, 322 U.S. at 670-71; Nowak v. United States, supra, 356 U.S. at 663 ("[I]t becomes our duty to scrutinize the record with the utmost care."); Knauer v. United States, supra, 328 U.S. at 657.

The sanction available against aliens is, of course, deportation rather than denaturalization. Deportation, by and large, involves administrative proceedings and the rights available to an alien are, unquestionably, less than those which attach to American citizens (whether through birth or naturalization). In recognition of the strong "family social and economic ties" frequently established by resident aliens, this Court has insisted that proof in an administrative deportation proceeding be by the same standard of "clear, unequivocal, and convincing" evidence which is required in denaturalization proceedings. Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 282-84 (1966). However, unlike the situation in

denaturalization cases, the administrative decision in such matters will be upheld on appeal if it is "supported by reasonable, substantial and probative evidence on the record considered as a whole . . . ," that is, if it is not clearly erroneous. 8 U.S.C. §1105a(a)(4).

3. We come, now, to the situation presented by the instant case. The action commenced by the INS against petitioner Sanchez was, in form, a deportation proceeding. That action was commenced upon the necessary assumption that petitioner is an alien, i.e., not an American citizen. However, in recognition of the fact that citizenship by birth is, in many respects, the highest form of American citizenship, 8 U.S.C. §1105a(a)(5) expressly provides that where "a genuine issue of material fact as to . . . nationality is presented," as it was here, the administrative proceedings must be terminated and the matter transferred to the District Court for a wholly separate "hearing de novo

of the nationality claim" in a declaratory relief proceeding. Moreover, although the statutory requirement of a specific judicial determination of citizenship in such cases makes obvious sense as a policy matter, given the critical nature of the right in issue, the requirement is not a matter of statutory grace, but of constitutional due process.[2]

The District Court passed upon petitioner's citizenship claim applying the requisite "clear, unequivocal and convincing" standard.[3] The Court of Appeals affirmed on

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2 In Ng Gung Ho v. White, supra, 259 U.S. 276, Justice Brandeis, speaking for a unanimous Court, noted that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. . . . To deport one who so claims to be a citizen obviously deprives him of liberty . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation with the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." 259 U.S. at 284-85.

3 The Court of Appeals not only held that it was required to affirm the District Court's decision unless "clearly erroneous" but also questioned -- without (footnote continued)

the ground that the decision of the district court was not "clearly erroneous." In following what the court termed its "normal practice" the Ninth Circuit expressly rejected petitioner's argument that independent review was required. Moreover, it did so without even a reference to this Court's decisions in

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(footnote continued from previous page)
deciding -- whether the "clear, unequivocal and convincing" standard should have been applied in the District Court. See Appendix I to the Petition for Certiorari at A-4. The court's expressed doubt on that point is, with all respect, untenable in light not only of the many decisions of this Court cited in text, but a number of Ninth Circuit decisions including Iran v. Immigration and Naturalization Service, 656 F.2d 469, 471 (9th Cir. 1981) in which the court noted that:

> [i]n deportation proceedings, the INS has the burden of proving deportability by 'clear, unequivocal and convincing evidence' [Woodby]. To prove deportability the INS must show that the subject of the deportation proceedings is an alien. . . . As a part of its burden, therefore, the INS must prove 'alienage,' i.e., that the subject of the proceeding is an alien.

See also Sandoval-Vera v. Immigration and Naturalization Service, 667 F.2d 792, 793 (9th Cir. 1982).

cases such as Baumgartner, Knauer or Chaunt.[4]

We freely concede that in so holding the court below did not expressly contradict any direct decision of this Court. It did, however, effectively frame the important issue which necessitates review here:

> Must the claims of a person who raises a genuine issue 5 that he or she is an American citizen as a matter of right (by birth or descent) be treated at least as

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4 The only case on the point which was discussed by the court below is Lim v. Mitchell, 431 F.2d 197 (9th Cir. 1970) in which the Ninth Circuit required an "independent determination" on appeal in a declaratory judgment action involving a citizenship claim. The court distinguished Lim as involving "special circumstances" without bothering even to note -- let alone discuss -- the earlier decisions of this Court (Chaunt and Knauer) which were cited and relied upon by Lim as the basis for the "independent determination" requirement. See 431 F.2d at 199.

5 Any concern that applying the standard of review urged by petitioner will complicate or frustrate INS policy is answered by the threshold requirement of section 1105a(a)(5) that the claim of nationality be supported by a "genuine issue of material fact." Moreover, since the issue presented has to do only with the standard of review on appeal, it is hard to see what additional burden or complication could be claimed in any event.

well on appeal as those of a naturalized citizen?[6]

There is, of course, no doubt as to how amici believe that question should be answered. However, the point for present purposes is that it is a question of sufficient moment to require consideration by this Court. The importance attached to loss of a bona fide claim of American citizenship is of such obvious substance that there should be no ambiguity concerning the legal standards under

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6 The point may be depicted graphically as follows:

Nature of Proceeding	District Court Burden of Proof	Scope of Appellate Review
Non-frivolous nationality claims (declaratory relief)	Clear, Unequivocal and Convincing	
Denaturalization proceeding	Clear, Unequivocal and Convincing	Independent Review
Administrative deportation of aliens	Clear, Unequivocal and Convincing	Substantial Evidence (Clearly Erroneous)

which such a determination is to be made. Cf. Nishikawa v. Dulles, 356 U.S. 129, 136 (1958) ("'Rights of citizenship are not to be destroyed by an ambiguity.'") (quoting Perkins v. Elg, 307 U.S. 325, 337 (1939)).

The Ninth Circuit's summary treatment of this critical issue is, with all respect, insupportable. It relegates individuals who have lived useful lives in a good-faith belief that they are both entitled to the rights and owe the responsibilities[7] of American citizenship to a status inferior to persons who have secured their citizenship through naturalization. To note that fact is in no way to demean the status of naturalized Americans; it is, rather, to demonstrate the untenability of the decision below and the consequent need for review by this Court.

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7 Petitioner lived much of his early life in Mexico. When he became 18 he returned to the United States to register for the draft (II RT 140-41, Ex.1). He has remained here ever since as a productive member of American society, working and raising a family of four children in this country.

B. Thousands of Native-Born United States Citizens Who May Require Citizenship Determinations Are Potentially Subject to the Standard of Review Established in the Case.

Both the circumstances of petitioner's birth and the absence of irrefutable formal proof of those circumstances are typical of many thousands of similarly-situated citizens of the United States. Those individuals were born in the border area of this country into immigrant families whose roots remained in Mexico. Because their births were often not in hospitals or attended by physicians, and their parents were unaware of or indifferent to American formalities, no birth certificates were recorded.

1. The first thirty years of this century witnessed a massive migration of Mexican people, mostly laborers, to the southwestern United States. While no one knows precisely the number of Mexican immigrants who entered the United States in that period, it is generally thought to exceed one million

persons.[8] Many of these immigrants entered openly without documents or formalities, since the border was a loosely defined barrier in those years.[9] Once installed in the United States, the immigrants and their families lived in "colonies" almost completely isolated from the institutions of American Society and from the native American population.[10]

The wave of Mexican immigration coincided with the birth of the southwestern states as an ecomomic empire.[11] Mexicans came to pick cotton and other agricultural produce, mine copper, and build railroads. The need for labor in many industries was so intense that

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8 Carey McWilliams, North from Mexico, p. 163 (1949).

9 See Abraham Hoffman, Unwanted Mexican Americans in the Great Depression, p. 11 (1974).

10 Mercedes Carreros de Velasco, Los Mexicanos Que Devolvio La Crisis, 1929-1932, (Mexico, D.F. 1974), p. 40.

11 McWilliams, supra, p. 163.

many "recruiters" smuggled workers across the border.[12]

A significant number of Mexican workers left the country as abruptly as they came. Long before the Depression, many Mexicans returned to Mexico "with relative ease to demonstrate the skills acquired and possessions obtained, to spend or invest the wealth earned ...."[13] Others left less properous. In 1921 when the World War I cotton boom exploded, ten thousand workers were left stranded and destitute in Arizona's Salt River Valley necessitating temporary relief from the Mexican counsul.[14] When the Depression began and domestic employment rose, thousands of

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12 Joan W. Moore, Mexican Americans, p. 22 (1970)

13 Hoffman, supra, p. 25. See also, John Martinez, Mexican Emigration to the U.S. 1910-1930, p. 75 (unpublished Ph.D. thesis at University of California, Berkeley, reprinted in 1971, by R. and E. Research Associates, San Francisco) where it is noted that in the early 1920's the Mexican government formed a Department of Repatriation.

14 McWilliams, supra, p. 174.

workers "[d]issappointed in their hopes of earning adequate wages...recrossed the border of their own volition...."[15]

The repatriation movement had its beginnings in 1931. Threatened by the federal government with deportation, and "persuaded" by local governments and welfare agencies, Mexican immigrants boarded trains that returned them to Mexico. Over 350,000 Mexican immigrants were repatriated in the four year period 1929-1932.[16] In the early thirties in Arizona, thousands of men were pulled from Works Progress Administration relief projects and loaded, families and all, on trains that carried them into Mexico.[17] Whole families were uprooted and followed the working parent back to his place of origin across the border,

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15 Hoffman, supra, p. 38.

16 McWilliams, supra, at 174.

17 Raymond Johnson Flores, The Socio-economic Trends of the Mexican People Residing in Arizona, p. 6 (unpublished thesis at Arizona State College, reprinted in 1973 by R. and E. Research Associates, San Francisco).

or elsewhere in Mexico. One contemporary observer noted that,

> Children of repatriated Mexican parents, including many American-born children with alien parents, are causing great concern to the welfare authorities in these areas. It was reported that some 15,000 such children with their parents went through Nogales, Arizona, just across the border from Nogales, Mexico, on their way back to Mexico. Many of these children have drifted back to the United States, particularly older children, and are living hand to mouth in Arizona.[18]

Inevitably, many of those repatriated sought re-entry into the United States by legal or illegal means. Many of the repatriated children were legally entitled to American citizenship,[19] although they could not document that fact. George P. Clements of the Los Angles Chamber of Commerce, who observed

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18 Id. at 6, quoting Katherine F. Senroot, "The Children's Bureau and Problems of the Spanish-Speaking Minority Groups" (unpublished mimeographed memorandum, United States Department of Labor, Childrens' Bureau, Washington, D.C., April, 1943, p.1). See also, Carreras de Velasco, supra, at p. 98.

19 Hoffman, supra, p. 148.

the departure of one of the repatriation trains, remarked:

> No child could return, even though born in America, unless he had documentary evidence and his birth certificate and was able to substantiate this, the burden of proof being placed entirely on the individual. This means that something like 60% of these children are American citizens without very much hope of ever coming back into the United States. 20

Clements' assumption that U.S. citizen children without documents could never return was naive, however, since they, like their parents, found undocumented border crossing easy for many years to come. Unlike their parents, however, those children had the right to enter, and were returning to their native land rather than setting off to cross a previously unknown frontier.

2. Without birth certificates or other formal proof of birthplace, United States citizens of Mexican family background are often hard-put to prove their citizenship. The question of citizenship may arise with some regularity in cases of this nature. See,

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20 Id., at 95.

e.g., Matter of Serna, Interim Decision No. 2681 (B.I.A. 1978) (visa application, applicant claiming citzenship by birth), Matter of Herrera, Interim Decision No. 2096 (B.I.A. 1971)(same); Matter of Lugo-Guardiana, Interim Decision No. 1861 (B.I.A. 1968) (deportation proceeding, issue as to validity of delayed birth certificate showing citizenship by birth); Matter of HH & HM, 3 I & N Decisions 680 (B.I.A. 1950) (issue as to validity of passport based on claim of citizenship by birth); Casares-Moreno v. United States, 226 F.2d 873 (9th Cir. 1955)(criminal proceeding, issue as to validity of delayed birth certificate showing citizenship).

As the foregoing citations illustrate, the circumstances of petitioner's birth are not unique and the issue posed by the need to determine those circumstances with precision is recurrent. To apply the same legal standard to persons who claim to have been born in this country in such circumstances as that applicable to aliens without any colorable

claim of citizenship would be to blink at the reality of the American Southwest's history and the thousands of undocumented native births that it produced.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Dated: April 9, 1984.

Respectfully submitted,

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